Supreme Court of the United States

October Term, 1949.

No 391

MARION J. SLOCUM, as General Chairman, Lackawanna Division No. 30 of The Order of Railroad Telegraphers,

Petitioner,

vs.

THE DELAWARE, LACKAWANNA & WESTERN RAILROAD COMPANY,

Respondent.

Respondent's Brief in Opposition to Petitioner's Application for a Writ of Certiorari.

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THE REPORTER COMPANY, INC., Walton, N. Y.—1949

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Statement.

The petitioner has filed with this Court a petition for writ of certiorari to the Court of Appeals of New York alleging that the jurisdiction of this Court is found in 28 U.S.C.A., §1257 (3). The validity of no statute either of the United States or of the State of New York has been questioned and presumably the petitioner is claiming some title, right, privilege or immunity under the statutes of the United States.

Petitioner in his petition has failed to specify, "the stage in the proceedings in the Court of first instance and in the Appellate Court, at which, and the manner in which, the federal questions sought to be reviewed were raised; the method of raising them (e.g., by a pleading, by request to charge and exceptions, by assignment of error); and the way in which they were passed upon by

the Court; with such pertinent quotations of specific portions of the record, or summary thereof, with specific reference to the places in the record where the matter appears (e.g., ruling on exception, portion of the Court's charge and exception thereto, assignment of error) as will support the assertion that the rulings of the Court were of a nature to bring the case within the statutory provision believed to confer jurisdiction on this Court. The provisions of this paragraph, with appropriate record page references, must be complied with when review of a State Court judgment is sought by petition for writ of certiorari" (Rule 12, Revised Rules of the Supreme Court of the United States).

Question Presented.

This action was instituted in the Supreme Court of the State of New York for the construction of certain contracts between respondent and petitioner and between respondent and Louis J. Carlo as General Chairman of System Board of Adjustment, Delaware, Lackawanna and Western Railroad, of Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees, hereinafter referred to as the "clerks." As indicated in the petition no appeal was taken by the clerks from the judgment of the Trial Court and they are not a party to this proceeding. The action "does not arise under any law regulating commerce," does not involve a dispute concerning "rates of pay, rules or working conditions" of the employees involved and does not involve "the validity, construction, enforcement or effect of the Railway Labor Act or any federal statute" (*Del. L. & W. R. Co. v. Slocum, et al.*, 56 F. Supp. 634, 636; 183 Misc. 454, 456; 50 N. Y. Supp. [2d] 313).

History of the Litigation.

The action was commenced in the Supreme Court of the State of New York by the service of the summons and verified complaint on the petitioner on March 3, 1944, and on the general chairman of the clerks on March 10, 1944. On March 23, 1944, the petitioner filed a petition and bond for removal of the action to the United States District Court for the Western District of New York. At the same time petitioner applied to the State Supreme Court for an order removing the action to said United States District Court. Such application was denied, Mr. Justice Personius writing an opinion which is reported at 183 Misc. 454, 50 N. Y. Supp. (2d) 313.

Thereafter the bond was submitted to the Honorable John Knight, United States District Judge for the Western District of New York, and approved by him and a certified copy of the record was filed in the District Court on April 12, 1944. On April 18, 1944, the petitioner moved in said Court to dismiss the action for lack of jurisdiction and the respondent on April 25, 1944, made a cross motion to remand the case to the State Court. The petitioner's motion to dismiss was denied and the respondent's motion to remand to the State Court was granted. Judge Knight wrote an opinion which is reported at 56 Fed. Supp. 634.

The clerks served an answer on May 4, 1944, and the petitioner served his answer on August 2, 1944. On January 29, 1945, the petitioner served a notice of motion for dismissal of the complaint under Rules 112 and 113 of the Rules of Civil Practice, returnable at a Trial and Special Term of the Supreme Court, Chemung County, on February 5, 1945. The motion was denied by Mr. Justice Newman in an unreported opinion which is printed in the record at folios 100-109, pp. 34-37.

The petitioner appealed from the order denying his motion and the order was unanimously affirmed by the Appellate Division of the Supreme Court in an opinion written by Presiding Justice Hill and reported in 269 App. Div. 467, 57 N. Y. Supp. (2d) 65.

The action was tried before the Hon. Bertram L. Newman on August 6, 1945, and the written opinion thereon, dated January 9, 1946 and not reported, is printed in the record following page 386.

The formal decision and the judgment were entered on March 7, 1946, and the defendant Slocum appealed to the Appellate Division of the Supreme Court from the judgment. The *per curiam* opinion on unanimous affirmance of the judgment is reported at 274 App. Div. 950, 83 N. Y. Supp. (2d) 513.

Petitioner's motion for leave to appeal to the Court of Appeals was granted by that Court on March 3, 1949. The judgment was affirmed by the Court of Appeals in an opinion written by Judge Conway and reported in 299 N. Y. 496, 87 N. E. (2d) 532.

The rights and liabilities of all the parties to this action have been declared and the controversy has been finally settled. The judgment is amply supported by the facts developed on the trial and the petitioner does not claim in his petition that the judgment of the Trial Court is not correct. The Trial Court found as findings of fact "that this action does not grow out of any dispute concerning rates of pay, rules or working conditions" and "that this action does not involve the validity, construction, enforcement or effect of any statute" (fols. 991-992, p. 331).

In the Appellate Division of the Supreme Court, which Court had power to review the facts and the weight of the evidence, the petitioner did not raise the question that the judgment was not amply supported by the facts or

that the findings of the Trial Court were not amply supported by the evidence.

In the Court of Appeals the only contention raised by the petitioner which could be used to invoke the jurisdiction of this Court under 28 U.S.C.A., §1257 (3) was the contention that the National Railroad Adjustment Board had *exclusive* jurisdiction under the Railway Labor Act to determine this controversy (299 N. Y. 499) (fols. 1515-1516, pp. 505-506). The Court of Appeals rejected such contention pointing out that the language of the applicable section of the Railway Labor Act (45 U.S.C.A., §153 Subd. First [i]), with respect to the submission of disputes to the Railroad Adjustment Board is "may be referred" which is clearly not mandatory (299 N. Y. 496, 502) (fol. 1531, p. 511). The Court of Appeals followed the decision of this Court in *Moore v. Illinois Cent. R. Co.*, 312 U. S. 630, 635-636, where it was held:

> "It is to be noted that the section pointed out, §153 (i) as amended in 1934, provides no more than that disputes 'may be referred * * * to the * * * Adjustment Board * * *'. It is significant that the comparable section of the 1926 Railway Labor Act (44 Stat. 577, 578), had, before the 1934 amendment, provided that upon failure of the parties to reach an adjustment a 'dispute shall be referred to the designated Adjustment Board by the parties, or by either party * * *'. Section 3 (c). This difference in language, substituting 'may' for 'shall', was not we think, an indication of a change in policy, but was instead a clarification of the law's original purpose. For neither the original 1926 Act, nor the Act as amended in 1934, indicates that the machinery provided for settling disputes was based on a philosophy of legal compulsion. On the contrary, the legislative history of the Railway Labor Act shows a consistent purpose on the part of Congress to establish and maintain a system for peaceful adjustment and mediation voluntary in its nature."

Statutes Involved.

It is the contention of the respondent that the Railway Labor Act is not involved in this litigation under this Court's decision in *Moore v. Illinois Cent. R. Co.*, 312 U. S. 630, and the plain wording of the statute above referred to and such has been the view of the United States District Court and the various State Courts heretofore considering this controversy.

It is likewise the contention of the respondent and the view of said Courts that there was no federal question involved. The remittitur from the Court of Appeals fails to state that any federal question was presented or necessarily passed on by that Court (pp. 495-497).

POINT I.

In view of the decision of this Court in *Moore* v. *Illinois Cent. R. Co.*, 312 U. S. 630, the petitioner has raised no question sufficiently substantial to support his petition for writ of certiorari.

The very question which petitioner here seeks to raise was decided by this Court on March 31, 1941. In *Moore v. Illinois Cent. R. Co.*, 312 U. S. 630, it was squarely held that the procedure before the National Railroad Adjustment Board was not an exclusive remedy and that a party was not compelled to present its claim to such Board, but had the choice of resorting to a Court of competent jurisdiction in the first instance. It was held also therein that the party need not seek an adjustment of the controversy as provided in the Railway Labor Act as a prerequisite to the bringing of an action in the State Court. The decision in the *Moore* case has never been overruled and has been followed in many state and federal cases.

In the case of *Washington Terminal Co. v. Boswell*, 124 Fed. (2d) 235, affirmed 319 U. S. 732, Associate Justice Rutledge writing for the United States Court of Appeals for the District of Columbia stated at page 238:

> "The decision" (*Moore v. Illinois Cent. R. Co.*, 312 U. S. 630) "establishes that in such circumstances the Act has neither excluded the general jurisdiction of the Courts nor made exhaustion of the administrative remedy prerequisite to its exercise, for decision of controversies which might be determined by the statutory method. At the threshold of controversy accordingly, the disputants have alternate routes which they may follow. One is entirely judicial without regard to the Railway Labor Act. The other is administrative and judicial, according to its terms."

and at page 244:

> "The *Moore* decision holds that Congress has not compelled disputants to go before the Board."

and again at page 249:

> "The foregoing considerations are reinforced by the fact that the carrier under the decision in *Moore v. Illinois Central R. R., supra*, can bring its suit on the contract, independently of the statute, prior to the time when the dispute is submitted to the Board. Until then, at least, it has its election to pursue the exclusively judicial remedy or to follow the administrative and judicial one provided by the Railway Labor Act."

It will be noted that in the *Washington Terminal Co. v. Boswell* case, the action was for a declaratory judgment by the employer and it was not held that the form of action was not proper or that such action could not be brought by any party to the dispute. The ground for dismissal was that the dispute had actually been submitted to and decided by the Railroad Adjustment Board.

The wording of the statute in respect to the referring of disputes to the National Railroad Adjustment Board is "may be referred" and as above stated, it is in no sense compulsory that the dispute be submitted to that tribunal for decision.

As pointed out in the opinions which have been written in the present case, the respondent has sought no rights under the Railway Labor Act, the action being one of construction or interpretation of the contracts between the parties (183 Misc. 454; 56 Fed. Supp. 634, 637; 269 App. Div. 467; 274 App. Div. 950; 299 N. Y. 496, 507) (fols. 1554-1555, pp. 518-519).

Before the Railway Labor Act of 1934, was enacted, the State Courts took jurisdiction of controversies involving the construction of working agreements such as those involved in this case (*Piercy v. Louisville & Nashville Ry. Co.*, 198 Ky. 477, 248 S. W. 1042; *McGregor v. Louisville & Nashville Ry. Co.*, 244 Ky. 635, 51 S. W. (2d) 953; *Panhandle and Santa Fe Ry. Co. v. Wilson* (Texas), 55 S. W. (2d) 216; *Long v. Baltimore & Ohio R. R. Co.*, 155 Md. 265, 141 Atl. 504; *Gregg v. Starks*, 189 Ky. 32, 224 S. W. 459; *Rentschler v. Missouri Pacific Ry. Co.*, 126 Nebraska 493, 253 N. W. 694; *McCoy v. St. Joseph Belt Ry. Co.*, 229 Mo. App. 506, 77 S. W. (2d) 175; *George T. Ross Lodge v. Brotherhood of Railroad Trainmen*, 191 Minn. 373, 254 N. W. 590; *Gary v. Central of Georgia Ry. Co.*, 37 Ga. App. 744, 141 S. E. 819). There has been no ousting of the jurisdiction of the State Courts by the enactment of the Railway Labor Act (*Moore v. Illinois Central* [*supra*]). The following are some of the cases adjudicated in the State Courts since enactment of the Act: *Brotherhood of Locomotive Engineers v. Mills*, 43 Ariz. 379, 31 Pac. (2d) 971; *Florestano v. Northern Pacific Ry. Co.*, 198 Minn. 203, 269 N. W. 407; *Moore v. Illinois Central*, 180 Miss. 276, 176 So. 593; *Swilley v. G.*

H. & S. A. Ry. Co. (Texas), 96 S. W. (2d) 105; *Franklin v. Pennsylvania-Reading S. S. Lines*, 122 N. J. Eq. 205, 193 Atl. 712; *McCrory v. Kurn* (Mo.), 101 S. W. (2d) 114; *Lyons v. St. Joseph Belt Ry. Co.* (Mo.), 84 S. W. (2d) 933; *Evans v. Louisville & N. R. Co.*, 191 Ga. 395, 12 S. E. (2d) 611; *Wooldridge v. Denver & R. G. W. R. Co.* (Col.), 191 Pac. (2d) 882; *Southern Ry. Co. v. Order of Ry. Conductors of America* (So. Car.), 41 S. E. (2d) 774.

Federal Courts within the State of New York have recognized the jurisdiction of the State Courts as proper tribunals to decide questions arising out of working agreements such as here presented (*Swartz v. So. Buffalo Ry. Co.*, 44 Fed. Supp. 447; *McDermott v. New York Central R. Co.*, 32 Fed. Supp. 873).

The construction of the working agreements is frequently by declaratory judgment (*Piercy v. Louisville & Nashville Ry. Co.*, 198 Ky. 477, 248 S. W. 1042; *Burton v. Oregon-Washington R. & Nav. Co.*, 148 Ore. 648, 38 Pac. [2d] 72; *Louisville & Nashville R. Co. v. Bryant*, 263 Ky. 578, 92 S. W. [2d] 749; *Wooldridge v. Denver & R. G. W. R. Co.* [Col.], 191 Pac. [2d] 882; *Southern Ry. Co. v. Order of Ry. Conductors of America* [So. Car.], 41 S. E. [2d] 774).

The petitioner advanced in the state courts the claim that the controversy here is not justiciable, relying on the decisions of *General Committee of Adjustment v. M. K. T. R. R. Co.*, 320 U. S. 323, and *General Committee of Adjustment v. Southern Pacific R. Co.*, 320 U. S. 338. Those cases are cited here in support of the petition. These are purely representation cases and have no application to this case which involves the question of interpretation of existing contracts. The *Southern Pacific* and *M. K. T.* cases presented the question of which union

was the proper bargaining representative for the engineers in handling controversies with the carrier's representatives. In the *Southern Pacific* case, the engineers claimed to be the exclusive representatives of all engineers whether belonging to their union or the Firemen's Union in handling their individual grievances. It sought to have the collective bargaining agreement between the carrier and the firemen, which provided that an engineer had the right to be represented by the committee of his own organization in the handling of his grievances, declared invalid under the Railway Labor Act. In the *M. K. T.* case, the engineers sought a declaratory judgment that they be declared the sole representatives of the locomotive engineers with exclusive right to bargain for them and that the mediation agreement which had been made between the firemen and the carrier be declared invalid as in violation of the Railway Labor Act. The engineers claimed that the carriers had no right under the Act to negotiate with the firemen on the subject of emergency engineers. This Court in each case held that such representation problems did not present justiciable controversies but should be resolved by the mediation procedure provided by the Act.

There is no representation dispute in the case at bar. It has been pleaded in the complaint and admitted in the answers that the petitioning Union is the sole bargaining agent for the telegraphers (pp. 8, 28), and the other defendant Union is the sole bargaining agent for the clerks (pp. 10-11, 25). The only issue involved in this case is which contract covers the positions held by the crew clerks. While the Courts will not determine who is the proper bargaining agent, the Courts will interpret the contracts duly and regularly entered into between the carrier and such sole bargaining agents.

The foregoing distinction was clearly pointed out in *Elgin, Joliet & Eastern Ry. Co. v. Burley*, 325 U. S. 711. The Court of Appeals in this case, quoting from the *Burley* case, said (299 N. Y. 496, 501-502) (pp. 509-511, fols. 1527-1531):

> "Beyond the initial stage of negotiations and conference the act provides for different methods of settlement for the two classes of disputes. As pointed out in *Elgin, Joliet & Eastern Ry. Co. v. Burley* (325 U. S. 711, 723), the first type 'relates to disputes over the formation of collective agreements or efforts to secure them. They arise where there is no such agreement or where it is sought to change the terms of one, and therefore the issue is not whether an existing agreement controls the controversy. They look to the acquisition of rights for the future, not to assertion of rights claimed to have vested in the past.' Concerning that class of disputes the act provides first for mediation before the National Mediation Board, if that fails, then voluntary arbitration; and if that fails, conciliation by presidential intervention (U. S. Code, tit. 45, §§155, 157, 160; see *Burley* case, *supra*, p. 725).
>
> "The second class of disputes 'contemplates the existence of a collective agreement already concluded or, at any rate, a situation in which no effort is made to bring about a formal change in terms or to create a new one' (*Burley* case, *supra*, p. 723). All parties and the Courts below agree that the instant case is within the second classification, and that the course prescribed by the act for the settlement of this type of dispute is submission to the Railroad Adjustment Board. • • • It will be noted that the wording of the statute with respect to the submission of disputes to the Board is 'may be referred' which is clearly not mandatory."

The petitioner relies also on the case of *Order of Railway Conductors v. Pitney*, 326 U. S. 561. In that case a dispute arose as to whether the yard conductors represented by the Trainmen's Union or the road conductors represented by the Conductors' Union should operate certain trains within the yard. The District Court had to act in a dual capacity as the railroad was in bankruptcy in that court. It had to instruct its trustees how to proceed and in so doing was obliged to interpret the Union agreements. The conductors claimed that the work in question could not be taken from them and given to the trainmen without negotiating the work out of their contract and asked the Court to enjoin such transfer of work unless such contract was changed by the method prescribed by the Railway Labor Act. They sought an injunction restraining the trustees from transferring the work until negotiated out of their contract by the process of mediation. The District Court had to determine whether there was any clear violation of a right given by Congress and in determining such question would have to interpret the conductors' agreement to determine whether it gave the conductors the work. If it did not, no negotiation of a new agreement was necessary. This Court held that the District Court properly proceeded to interpret the agreements insofar as instructing its trustees was concerned but it should have refrained in its discretion from interpreting the contracts as a basis for injunctive relief to give the parties the opportunity to have the contracts interpreted by the National Railroad Adjustment Board.

The fact that the Court had to interpret the contracts in two capacities, in the first of which it was identified with one of the parties to the dispute, made it proper and desirable that it should pass the question to another tribunal for determination as between the parties.

The *Pitney* case does not hold that the matter was not justiciable as it was suggested that it be given to the Adjustment Board which equally with the Courts under the *Moore* decision may interpret the contracts. It does not deny to the Courts the right to interpret the contracts but states that under the circumstances of that case as a matter of discretion the court of equity should stay its hand. Furthermore, the case was essentially one in reference to alteration of an existing contract, a case on the mediation rather than the adjustment side of the statute, the suit being one for an injunction to stay what was claimed to be a clear violation of a right given by the statute, i. e., that the existing agreement be changed only in the manner prescribed by the Act.

There is nothing in the *Pitney* case in conflict with the decision in the case at bar where the Court merely has exercised its jurisdiction to interpret existing contracts. No question of negotiating contracts is involved and no question of acting in a dual capacity.

In referring to the *Pitney* case the Court in *Southern Ry. Co. v. Order of Ry. Conductors of America* (So. Car.), 41 S. E. (2d) 774, stated at page 778:

> "It might further be noted that the Supreme Court in the *Pitney* case did not hold that the Federal Court did not have jurisdiction. It merely held that in consideration of the complicated features of the case, the Court should retain jurisdiction to stay action on the prayer for injunction in order to permit the parties to first have the two contracts interpreted by the administrative procedure provided in the Railway Labor Act. Nowhere in the opinion of the Court do we find any reference made to the case of *Moore v. Illinois Cent. R. Co., supra.* If it had been the intention of the Court to overrule the *Moore* case which was decided in 1941, we think this would have been done in specific language."

In the case just cited, the United States District Court remanded the cause to the state court. In the opinion reported at 63 Fed. Supp. 306, the Court said at page 308:

> "And so it is quite clear that there is concurrent jurisdiction of the subject matter of this suit either by the Adjustment Board or a court of competent jurisdiction. The parties by agreement may use either method of adjudication, or either party may institute an action in a court or before the Board. I am of the opinion that if the matter is taken first before a Court it will retain jurisdiction and carry the case through to an adjudication. If, however, the Board has taken jurisdiction the Court will not interfere. These views seem amply sustained by numerous decisions of our Courts."

In remanding the present cause to the state court, the District Court Judge used similar language (56 Fed. Supp. 634, 637):

> "As hereinbefore pointed out, the instant action is simply one to declare the meaning of certain contracts. However worthwhile procedure under the Railway Labor Act may be, no law makes it compulsory and no law denies the jurisdiction of the State Court."

It has been held that the Railway Labor Act does not preclude state action in regulation of working conditions. *Terminal R. Assn. v. Brotherhood of R. Trainmen*, 318 U. S. 1. Likewise, there is nothing in the Act to indicate it furnishes an exclusive remedy for controversies heretofore justiciable in the courts. In creating the Adjustment Board, the plain intent of Congress was to provide an additional tribunal which might be used at the option of the parties. No railroad employee having a claim against his employer on contract should be obliged

to go to the Board to have his contractual rights and obligations determined when local courts, federal or state, provide a more convenient forum.

Any delay in progressing this controversy through the state court is largely attributable to the petitioner's efforts to remove a non-removable case and to have the state court hold that it lacked or should decline on discretionary grounds to exercise jurisdiction.

No new or novel question is presented on this application for certiorari in respect to the application of the Railway Labor Act, nor is there any contention that there is a conflict of decisions in the state or federal courts. The jurisdiction of the state court has been upheld on seven occasions in the course of this litigation and by each of the Courts which examined it. The question sought to be raised is so insubstantial in the light of the clear decisions of this Court, it is respectfully submitted the petition should be denied.

POINT II.

The petition should be denied.

Respectfully submitted,

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